FILED
AUG 16 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1657

IN THE
# Supreme Court of the United States

WASHINGTON,
*Petitioner,*

v.

WASHINGTON EDUCATION ASSOCIATION,
*Respondent.*

On Petition For A Writ of Certiorari
to the Supreme Court of Washington

## BRIEF OF EVERGREEN FREEDOM FOUNDATION AND TWELVE LEADING PUBLIC POLICY ORGANIZATIONS IN SUPPORT OF PETITIONER

Harry J. F. Korrell
*Counsel of Record*
Eric B. Martin
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

## QUESTION PRESENTED

Is the opt-out procedure approved by the Court in *Chicago Teacher's Union Local 1 v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986), the only method by which a state may protect the First Amendment rights of non-union employees from abuse by unions, or may the state provide additional protections such as Washington's opt-in procedure?

Question Presented ..... i

INTEREST OF *AMICI CURIAE* ..... 1

REASON FOR GRANTING THE WRIT ..... 4

I. Introduction and Overview ..... 4

II. This Case Addresses an Important Question of Federal Law That Has Not Been Decided By This Court ..... 6

A. Washington's Opt-In Procedure Was Necessary to Protect Non-Union Members and the Political Process ..... 7

B. The Important Issues Raised in This Case Are Not Limited to Washington and the WEA ..... 10

III. This Case Provides an Opportunity for the Court to Address the Next Logical Step in the "Union Dues" Line of Cases ..... 13

Conclusion ..... 17

## TABLE OF AUTHORITIES

**Cases:**

*Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, (1977) passim
*Chicago Teacher's Union Local 1 v. Hudson*, 475 U.S. 292 (1986) passim
*Elrod v. Burns*, 427 U.S. 347, 355-57, (1976) 15
*Federal Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982) 14
*Hurley v. Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557 (1995) 15
*International Association of Machinists v. Street*, 367 U.S. 740, 749, (1961) 13, 14
*Keller v. State Bar of California*, 496 U.S. 1, 17 (1990) 5, 15
*Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) 5
*Lincoln Fed. Labor Union 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 531 (1949) 13
*Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997) 16
*Pocatello Education v. Heideman*, 2005 WL 3241745 (D. Idaho 2005) (same); *see also* 16
*Shea v. International Ass'n of Machinists*, 154 F.3d 508 (5th Cir. 1998) 16
*Utah Educ. Ass'n v. Shurtleff*, 2006 WL 1184946 (D. Utah 2006) 16

**Statutes:**

29 U.S.C. § 159(e) 11
29 U.S.C. § 441b(a) 13
Alaska Stat. §§ 15.13.074(f), 15.13.135 (LexisNexis 2004) 11

Ariz. Rev. Stat. Ann. §§ 16-919(B), 16-920, 16-921 (West Supp. 2005) 11
Cal. Gov't Code §§ 3515.7(d), 3546(d)(1) (West Supp. 2006) 11
Cal. Pub. Util. Code § 99566.1(d)(1) (West Supp. 2006) 11
Idaho Code § 44-2603 11
Iowa Code Ann. § 20.26 (West 2001) 11
5 Ill. Comp. Stat. Ann. 315/3 (West 2005) 10
115 Ill. Comp. Stat. Ann. 5/11 (West 1998) 10
Md. Code Ann., Elec. Law §§ 13-242 (LexisNexis Supp. 2005), 13-243 (LexisNexis 2002) 11
Md. Code Ann., Educ. § 6-504 (LexisNexis Supp. 2004) 10
Mich. Comp. Laws Ann. §§ 169.254, 169.255 (West 2005) 11
Minn. Stat. Ann. § 179A.06(3) (West Supp. 2006); 10
Mont. Code Ann. §§ 39-31-402, 39-32-109 (2005) 10
Neb. Rev. Stat. Ann. §§ 49-1469, 49-1469.06 (LexisNexis Supp. 2005) 11
N.M. Stat. Ann.§ 10-7E-4(J) (Michie Supp. 2003); 10
N.J. Stat. Ann. § 34:13A-5.5(b) (West Supp. 2005); 10
N.C. Gen. Stat. Ann. §§ 163-278.19(a) & (b) (LexisNexis 2005) 11
N.D. Cent. Code § 16.1-08.1-03.3 (LexisNexis Supp. 2005) 11
Ohio Rev. Code Ann. § 3599.031(A) (West Supp. 2006) 11
Ohio Rev. Code Ann. §§ 3517.082, 3599.03 (West Supp. 2006) 11
Pa. Cons. Stat. Ann. §§ 1102.2 & 1102.4 (West Supp. 2005). 10
Pa. Cons. Stat. Ann. § 1101.1701 (West 1991) 11
S.D. Codified Laws Ann. §§ 12-25-1(1), 12-25-2 (LexisNexis Supp. 2003) 11
Utah Code Ann. §§ 20A-11-1403 (LexisNexis 2003), 20A-11-1404 (LexisNexis Supp. 2005) 11

Vt. Stat. Ann. tit. 3, §§ 902(19), 1011(4) (Lexis Nexis 2003). 10
Wash. Rev. Code § 42.17.760 passim
Wis. Stat. Ann. § 11.29 (West 2004) 11
Wis. Stat. Ann. §§ 111.02(10m), 111.70(1)(n) & (2), 111.85(2)(a) (West Supp. 2002), 111.81(16) (West Supp. 2005) 11
Wyo. Stat. Ann. § 22-25-102 (LexisNexis 2005) 11
Wyo. Stat. Ann. § 22-25-102(h) (LexisNexis 2005) 11

## INTEREST OF *AMICI CURIAE*[1]

The Evergreen Freedom Foundation, founded in 1991, is a non-partisan, public policy research organization with 501(c)(3) status, based in Olympia, Washington. The Foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government. The Foundation's efforts center around core areas of state budget and tax policy, labor policy, welfare reform, education, citizenship and governance issues. To this end, the Foundation has promoted efforts to protect employees, including school teachers, from coerced political speech.

The American Legislative Exchange Council (ALEC) is the nation's largest bipartisan, individual membership association of state legislators, with more than 2,400 members. ALEC's mission is to advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty, through a non-partisan, public-private partnership between America's state legislators and concerned members of the private sector, the federal government and the general public. ALEC's Task Forces have approved several model bills that protect the First Amendment rights of workers represented by labor organizations.

The Cascade Policy Institute is a non-profit public policy research organization based in Portland, Oregon. Its mission is to explore and advance public policy alternatives

---

[1] Pursuant to Supreme Court Rule 37.6, this brief is filed with the written consent of all parties. *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation of this brief.

that foster individual liberty, personal responsibility, and economic opportunity.

The Commonwealth Foundation for Public Policy Alternatives is a nonprofit, nonpartisan, research and educational institute based in Harrisburg, Pennsylvania. Dedicated to advancing the Founding principles of limited constitutional government, economic and political freedom, and personal responsibility for one's actions, the Commonwealth Foundation conducts policy analysis and research to improve the lives of all Pennsylvanians.

Excellent Education for Everyone (E3) is a non-profit organization, made up of New Jersey citizens from across the political, racial, religious, ethnic, and regional spectrum dedicated to promoting choice and accountability in the public school system. It was founded in 1999 and works to ensure that all parents, regardless of income, have the power and the resources to decide where and in what way their children are educated.

The Grassroot Institute of Hawaii, founded in 2001, is a non-partisan, public policy research organization with 501(c)(3) status, based in Honolulu, Hawaii. The mission of the Grassroot Institute of Hawaii is to identify "people problems," such as barriers to productivity, wealth creation and personal happiness, and then study, analyze, publish and aggressively pursue creative self-government centered solutions. The individual and his or her search for meaning and happiness in a civil society is stressed. We are thus Grassroot, not Grassroots.

The Georgia Public Policy Foundation is an independent, public policy think tank. Formed in the fall of 1991, the Foundation's members are a diverse group of Georgians that share a common belief that the solutions to most problems lie in a strong private sector, not in a big government bureaucracy. The Foundation is a champion of

personal and economic freedom and is committed to providing a free market perspective based on the principles of limited government, respect for the lives and property of others, and responsibility and accountability for one's actions.

The Independence Institute, founded in 1985, was established upon the eternal truths of the Declaration of Independence. Based in Colorado, the Independence Institute is a non-partisan, non-profit public policy research organization dedicated to providing timely information to concerned citizens, government officials, and public opinion leaders.

Founded in 1990, the John Locke Foundation is nonpartisan 501(c)(3) public policy research center based in Raleigh, North Carolina. The John Locke Foundation's mission is to promote solutions to North Carolina's most critical challenges. The John Locke Foundation seeks to transform state and local government through the principles of competition, innovation and individual liberty, which principally requires the repeal or judicial invalidation of laws and regulations that restrict people from engaging in peaceful and voluntary activities or compelling them to engage in activities they do not support.

The Mackinac Center for Public Policy is a Michigan-based, nonprofit, nonpartisan research and educational institute dedicated to advancing policies that foster free markets, limited government, personal responsibility, and respect for property rights. The Mackinac Center was founded in 1988.

The Nevada Policy Research Institute is a nonprofit organization dedicated to finding free-market solutions to state and local public policy problems. The Institute works to help the people of Nevada appreciate the fundamental requirements of a free society. NPRI also directly provides

the state's elected officials, Institute members, business leaders and journalists with independent research on matters essential for freedom. Priority goals include better schools, low taxes and an entrepreneur-friendly business climate for Nevada.

The Pacific Research Institute (PRI), located in San Francisco, CA, is a non-partisan, non-profit, 501(c)(3) organization which was founded in 1979. PRI champions freedom, opportunity, and personal responsibility for all individuals by advancing free-market policy solutions. It demonstrates why the free market is more effective than government at providing the important results we all seek—good schools, quality health care, a clean environment, economic growth, and technological innovation. PRI puts "ideas into action" by informing the media, lawmakers, opinion leaders, and the public.

The Pioneer Institute for Public Policy Research is an independent, non-profit organization specializing in the support, distribution, and promotion of research on market-oriented approaches to Massachusetts public policy issues.

## REASON FOR GRANTING THE WRIT

*"To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." – Thomas Jefferson.*[2]

### I. Introduction and Overview

As explained in detail in the State's petition, Washington law allows unions to negotiate "union security" provisions in collective bargaining agreements. These clauses typically require that an employer terminate the

---

[2] THE JEFFERSONIAN CYCLOPEDIA, 2267 (John P. Foley, ed. Russell & Russell, 1967).

employment of any employee in the relevant bargaining unit who is not a member in good standing with the union, unless that employee pays an "agency shop fee" to the union. That fee generally approximates the portion of a regular union member's dues that are spent on collective bargaining activities.

If the agency shop fee is used for purposes unrelated to collective bargaining, such as litigation that does not concern the employee's bargaining unit or to support the union's political agenda, that use violates the nonunion employee's First Amendment right not to be compelled to finance political speech. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, (1977). According to this Court, union political expenditures may only "be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of government employment." *Abood*, 431 U.S. at 235.

In *Chicago Teacher's Union Local 1 v. Hudson*, 475 U.S. 292 (1986), the Court "outlined a minimum set of procedures" unions must follow before they can use agency shop fees for political purposes. *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990). According to *Hudson*, the First Amendment requires unions to give nonmember fee payers the opportunity to object to – to "opt out" of – having a portion of their agency fee used for political purposes.

At issue in this case is whether a state is limited to providing the minimal protections set out in *Hudson* or may go farther to protect nonunion employees by enacting additional procedural safeguards. Washington voters passed a statute that provides such additional protection: under Wash. Rev. Code § 42.17.760, a nonunion employee paying an agency fee to a union under an agency shop provision

must "affirmatively authorize" that her agency fee may be used for political purposes. In essence, Washington has adopted an "opt-in" mechanism: agency fee payers must affirmatively consent to the union's use of their agency fee for political purposes.

This statute was held unconstitutional by the Washington Supreme Court. 130 P.3d 352 (2006). That court held that a union has a First Amendment right to spend dues and agency fees for political purposes and that that right outweighs a non-union member's First Amendment right to be free from coerced political contributions. This Court should grant the state's petition and review the Washington Supreme Court's decision because it addresses an important question of federal constitutional law not yet directly addressed by the Court and because it raises issues of significant importance to the states and the lower courts.

The State's petition ably sets forth the conflicts among the lower courts and explains the reasons the decision of the Washington Supreme Court conflicts with this Court's precedents. *Amici* write to provide additional context to the dispute, to explain the widespread nature of the problem of union collection and misuse of agency fees for political purposes, and to encourage the Court to bring clarity to an important issue of constitutional law.

## II. This Case Addresses an Important Question of Federal Law That Has Not Been Decided By This Court

Union dues, including agency shop fees paid by nonmembers may be used for contract-related activities. In addition, Washington law permits those fees to be used for charitable, social, and political activities. In order to protect the rights of agency fee employees, the voters of the State of Washington, as part of a comprehensive campaign and

governmental reform initiative, enacted the Fair Campaigns Practices Act, codified as Wash. Rev. Code § 42.17.760. The people of the State of Washington enacted a restriction to secure consent from agency payers before collecting dues used for activities other than collective bargaining. In short, the people of the State of Washington enacted an "opt-in" procedure rather than the more familiar "opt-out" procedure for protecting the First Amendment rights of agency fee payers.

This Court has never addressed the constitutionality of such an "opt-in" procedure. Doing so now would address a growing area of concern in the states and resolve a conflict among the lower courts regarding the level of protection that can be provided to non-union members.

## III. Washington's Opt-In Procedure Was Necessary to Protect Non-Union Members

In 1992, the voters of the state of Washington enacted Initiative 134, the Fair Campaign Practices Act, by a nearly 3 to 1 ratio. The Act, codified at Wash. Rev. Code §42.17.760, is a comprehensive campaign reform measure that, among other things, instituted campaign donation limits, prohibited solicitation of public employees by public officials, restricted contributions from political parties and caucuses to candidates, established public reporting requirements for candidates, and, at issue here, prohibited the use of agency shop fees collected by unions from non-union employees for political purposes unless authorized in advance by the agency fee payer.

The conduct of Respondent provides a clear example of the need for meaningful protection of employees and vigorous enforcement of Washington's Fair Campaign Practices Act. The Washington Education Association's record, along with that of its local and national affiliates, demonstrates a blatant disregard for the rights of teachers and

the need for transparency of Washington state's electoral process:

- In 1996, the WEA was charged with three violations of Wash. Rev. Code 42.17. First, the WEA and WEA-PAC failed to properly disclose a $162,255 donation from the WEA to WEA-PAC; second, WEA and WEA-PAC failed to disclose $170,000 contributions from WEA to WEA-PAC; and third, WEA formed a second political action committee, the Community Outreach Program, which did not file as a political committee. The State of Washington brought suit against the WEA, ultimately agreeing to a $430,000 settlement: $330,000 was refunded to members, $80,000 was paid as a penalty, and $20,000 was paid in costs and attorneys fees.[3] Richard Heath, senior assistant attorney general, said it was the largest penalty assessed for campaign violations.[4]

- In 1997, a WEA Lobbyist was cited for violations of RCW 42.17.150, 42.17.155, and 42.17.170 for twenty-three monthly reporting violations, for falsely reporting her employer as the WEA, and for failing to timely report four political contributions.

- Also in 1997, the WEA Executive Director was cited for violations of RCW 42.17.150, .155, and .170 for one hundred and eight (108) false monthly reports, and sixty reporting violations for falsely reporting his employer as the WEA. He was fined $6,000 with $2,000 suspended.

---

[3] *AG announces settlement in WEA campaign finance suit.* Attorney General's Office (February 27, 1998). *Available at* http://www.atg.wa.gov/releases/rel_wea_022798.html

[4] *Union settles campaign finance suit; WEA to pay $430,000 in agreement with state*, Seattle P-I. February 28, 1998, at A1. *Available at* http://seattlepi.nwsource.com/archives/1998/9803010079.asp

- In late 1997, the WEA and NEA were charged with concealing the source of political contributions by funneling $410,000 through WEA.

- In 1999, the WEA was fined $15,000 for failing to disclose, as part of discovery in a lawsuit, the union's political plan for the 1996 elections as part of a lawsuit.

- In 2004, Three WEA local building representatives were fined for using public facilities for statewide ballot measure in violation of Wash. Rev. Code § 42.17.130.

After passage of Initiative 134, most union members decided not to support the union's political spending.[5] Washington's experience matches that of other states that have enacted similar provisions.[6] This reaction reflects the fact that it is often burdensome for non-members to comply with the opt-out procedures and easy to overlook strict deadlines for opting-out. Many agency fee employees are unaware of their right to opt-out of these dues. In 2004, the Independence Institute, a Colorado-based free market think tank began informing Colorado teachers union members of their right to opt-out of the expressly political union dues.[7] The number of teachers choosing to opt-out increased more than fourfold after the first year of these efforts. Such facts are powerful evidence that an opt-out scheme results in non-members' unwittingly or unwillingly supporting political spending by unions.

---

[5] *The State of Labor, Appendix A*, Evergreen Freedom Foundation, August 2005. *Available at* www.effwa.org/pdfs/labor2005.pdf

[6] Michael Reitz, *Paychecks Unprotected*, Labor Watch, January 2006. *Available at* www.capitalresearch.org/pubs/bdf/LW0106.pdf.

[7] Colorado is a "right to work" state, permitting non-members to opt-out of union membership completely, not just of contibutions used for political purposes. The Washington statute permits opting out only of the amount used for non-collective bargaining activities.

In fact, a recent study demonstrates that it is easier for employees to opt-in than it is for them to opt-out. Lance T. Izumi, *Giving a Voice to Workers Why California Needs Paycheck Protection*, Pacific Research Institute, October 2005.[8] The study also found that an opt-in plan increases union communication with employees and ensures all contributions are voluntary. *Id.*

Among other reforms enacted by Initiative 134, it prevents non-union members from unwittingly or unwillingly financially supporting political causes with which they disagree.

## IV. The Important Issues Raised in This Case Are Not Limited to Washington and the WEA

The issues raised in this case are the subject of examination and controversy around the country. Resolution of these issues would provide important guidance for the courts and policy-making bodies of the states and promote the orderly resolution of "paycheck protection" laws, or laws intended to make it easier for union and agency payer employees to opt out of part or all of the union dues.

States balance the interests in fair elections and the burdens on employees in a variety of ways. Like Washington, some states have enacted statutes that require voluntary political contributions to be separate from the compelled fee. *See, e.g.*, 5 Ill. Comp. Stat. Ann. 315/3(g) (West 2005); 115 Ill. Comp. Stat. Ann. 5/11 (West 1998). Others completely prohibit the use of nonmember fees for political activities or contributions. *See, e.g.*, Md. Code Ann., Educ. § 6-504(d)(3)(iv)(2) (LexisNexis Supp. 2004); Mont. Code Ann. §§ 39-31-402(3), 39-32-109(2)(d) (2005). Unlike Washington, not all states allow unions to compel

---

[8] *Available at*: www.pacificresearch.org/pub/sab/entrep/2005/PaycheckProtect.pdf/

nonmembers to pay an amount equal to dues. Some limit the amount to the costs of representing the members of the bargaining unit, *see, e.g.*, Md. Code Ann., Educ.§§6-504(b), (d)(1) & (d)(3)(iv)(1) LexisNexis Supp. 2005). Others limit the fee to a fixed percentage of dues. *See, e.g.*, Minn. Stat. Ann. § 179A.06(3) (West Supp. 2006); N.J. Stat. Ann. § 34:13A-5.5(b) (West Supp. 2005) ; Vt. Stat. Ann. tit. 3, §§ 902(19), 1011(4) (LexisNexis 2003). Still others limit the fee to the constitutional maximum. N.M. Stat. Ann.§ 10-7E-4(J) (Michie Supp. 2003); Pa. Cons. Stat. Ann. §§ 1102.2 & 1102.4 (West Supp. 2005). Some even allow the bargaining unit members to rescind or de-authorize the compulsory unionism requirement, Cal. Gov't Code §§ 3515.7(d), 3546(d)(1) (West Supp. 2006); Cal. Pub. Util. Code § 99566.1(d)(1) (West Supp. 2006); Wis. Stat. Ann. §§ 111.02(10m), 111.70(1)(n) & (2), 111.85(2)(a) (West Supp. 2002), 111.81(16) (West Supp. 2005); see also 29 U.S.C. § 159(e).

Alabama, Arizona, Arkansas, Kansas, Florida, Georgia, Idaho, Iowa, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming are "right to work" states, prohibiting any compulsory union dues – whether or not they are related to collective bargaining.[9] Idaho, Michigan, Wyoming, Utah, and Ohio have paycheck protection statutes, prohibiting use of any union dues for political activities without written

[9] See http://www.nrtw.org/rtws.htm

consent from the member.[10] Other states deal with the influence of unions in politics in an array of other manners.[11]

In addition, the United States Congress, along with the people and legislatures of California, Oregon, Nevada, Florida, Georgia, South Carolina, Oklahoma, and Pennsylvania have all examined the issue in recent years and considered a variety of potential paycheck protection legislation.

The decision of the Washington Supreme Court will likely have serious implications for the laws of all of these states, as unions aggressively fight these efforts both in the legislature and in court. If the Washington Supreme Court's misinterpretation of the First Amendment is allowed to stand, it will undoubtedly be used to justify repeal of important employee protections enacted by other states.

---

[10] See Idaho Code § 44-2603; Ohio Rev. Code Ann. § 3599.031(A) (West Supp. 2006); Wyo. Stat. Ann. § 22-25-102(h) (LexisNexis 2005); Mich. Comp. Laws Ann. §§ 169.254, 169.255 (West 2005); Utah Code Ann. §§ 20A-11-1403 (LexisNexis 2003), 20A-11-1404 (LexisNexis Supp. 2005).

[11] For statutes restricting union political solicitations and contributions see Alaska Stat. §§ 15.13.074(f), 15.13.135 (LexisNexis 2004); Ariz. Rev. Stat. Ann. §§ 16-919(B), 16-920, 16-921 (West Supp. 2005); Iowa Code Ann. § 20.26 (West 2001); Md. Code Ann., Elec. Law §§ 13-242 (LexisNexis Supp. 2005), 13-243 (LexisNexis 2002); Neb. Rev. Stat. Ann. §§ 49-1469, 49-1469.06 (LexisNexis Supp. 2005); N.C. Gen. Stat. Ann. §§ 163-278.19(a) & (b) (LexisNexis 2005); N.D. Cent. Code § 16.1-08.1-03.3 (LexisNexis Supp. 2005); Ohio Rev. Code Ann. §§ 3517.082, 3599.03 (West Supp. 2006); Pa. Cons. Stat. Ann. § 1101.1701 (West 1991); S.D. Codified Laws Ann. §§ 12-25-1(1), 12-25-2 (LexisNexis Supp. 2003); Wis. Stat. Ann. § 11.29 (West 2004); Wyo. Stat. Ann. § 22-25-102 (LexisNexis 2005).

## V. This Case Provides an Opportunity for the Court to Address the Next Logical Step in the "Union Dues" Line of Cases

Under the law of Washington and several other states, a public employee collective bargaining agreement may include a union security clause, requiring nonmembers of the union to pay an agency shop fee to the union. Such an arrangement is not required by the constitution. *Lincoln Fed. Labor Union 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 531 (1949). Union dues, including agency shop fees paid by nonmembers, may be used for collective bargaining activities. In addition, Washington law permits those fees to be used for charitable, social, and political activities. However, there is no constitutional right for unions to make such expenditures from their general treasury. *See* 2 U.S.C. § 441b(a) (prohibiting unions from making federal political contributions from their general treasuries); *Federal Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982) ("we conclude that the associational rights asserted by the respondent may be and are overborne by the interests Congress has sought to protect in enacting ¶ 441b").

Through a line of cases beginning with *International Association of Machinists v. Street*, 367 U.S. 740, 749, (1961), and continuing through *Chicago Teacher's Union Local 1 v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986), this Court has given contour to the constitutional limits of mandatory collection of union dues. One question remains: Is an opt-out scheme mandatory for non-union members, or may a public employer establish a program that provides additional protections for non-union employees? This case presents the opportunity for the Court to address that important national issue.

In *International Association of Machinists v. Street*, 367 U.S. 740 (1961), the Court considered whether a union receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes. The Court recognized the government's interest in supporting the important role unions play in preserving workplace harmony. Compulsory dues or fees to the union were justified by the union's obligation to represent all employees, whether members or not, as well as the union's desire to avoid free-riders. Therefore, the Court affirmed the union's right to collect fees from all employees who benefit from the union's collective bargaining activities. The Court held, however, that compulsory union dues may not be used to support political causes if the member disagrees with those causes. On the other hand, "the majority also has an interest in stating its views without being silenced by the dissenters." *Id.* at 773. The Court stated that the appropriate remedy must reconcile the majority and dissenting interests in the area of political expression, protecting both interests "to the maximum extent possible without undue impingement of one on the other," and taking into account the administrative difficulty of accommodating each group. *Id.*

In *Abood v. Detroit Bd. Of Education*, the Court was asked to limit dues collection for ideological purposes in the public sector. The Court addressed the First Amendment issues raised by the use of objectors' fees for "purposes other than collective bargaining." *Id.* at 232. The Court held that government-compelled payments used to fund ideological and political causes lie "at the heart" of First Amendment protections. *Id.* at 234, 234-35. The Court held that the union was allowed to use members' dues for purposes other than collective bargaining, provided the money did not come from employees who objected to the causes supported. *Abood*, 431 U.S. at 222. "[T]he Constitution requires only that such expenditures be financed from charges, dues, or assessments

paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 235-36. Importantly, *Abood* did not address use of non-members' dues.

Finally, in *Chicago Teacher's Union Local 1 v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986), the Court held that the constitutional requirements for a union's collection of agency fees include (1) an adequate explanation of the basis for the fee, (2) a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker, and (3) an escrow for the amounts reasonably in dispute while such challenges are pending. *Hudson*, 475 U.S. at 310. The Hudson Court approved an opt-out procedure as consistent with the requirements of the First Amendment. *Id.* That procedure allowed any non-union member who objected to payment of such dues to notify the union of that fact, after which the union was required to refund that portion of dues that was not used for collective bargaining purposes.

These cases struggle with a tension between two fundamental rights. The First and Fourteenth amendments to the United States Constitution protect the freedom of an individual to associate for the purpose of advancing beliefs and ideas. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233, (1977); *Elrod v. Burns*, 427 U.S. 347, 355-57, (1976). On the other hand, equally protected is a person's right not to be compelled to support political and ideological causes with which he or she disagrees. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557 (1995). Freedom of speech includes the freedom not to speak or to have one's money used to advocate ideas one opposes. *Keller v. State Bar of Calif.*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1

(1990).[12] "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 234-35.

Left unanswered by this line of cases is whether the annual opt-out procedures approved in *Hudson* are constitutionally ***required*** as the Washington Supreme Court held, or if an opt-in procedure can be implemented consistent with the First Amendment. This case squarely presents that question. The Court should grant certiorari to answer this important constitutional matter.

The unsettled state of the law is not only reflected in the range of legislation enacted by the policy-making branches of government. The policies enacted to deal with the problems of protectioning employee rights have not escaped the attention of the courts. The decision of the Washington Supreme Court conflicts with the decision of the Sixth Circuit in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997). There, the Court of Appeals reversed a district court decision that a state law requiring annual affirmative consent (i.e. an "opt-in") to payment of dues for political purposes was unconstitutional. Given the rising importance of this issue, it is not surprising that courts are facing these questions more frequently. *See Pocatello Education v. Heideman*, 2005 WL 3241745 (D. Idaho 2005) (constitutionality of ban on political payroll deductions.); *Utah Educ. Ass'n v. Shurtleff*, 2006 WL 1184946 (D. Utah 2006) (same); *see also Shea v. International Ass'n of Machinists*, 154 F.3d 508 (5th Cir. 1998) (addressing the

---

[12] For this reason, the Washington Supreme Court's reliance on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) is completely inapposite. That case held that organizations could control their membership by excluding others – here the WEA attempts to control its membership by requiring non-members to support it financially.

minimum requirements of notice by dues objectors and noting direct conflict with Sixth Circuit and D.C. Circuit).[13]

The Court should accept review of this case to provide guidance to the states, especially given the wide variety of methods the states have developed to protect employee pay. Furthermore, the Court should resolve the conflict among the Fifth and Sixth Circuits and the Washington Supreme Court.

## CONCLUSION

For the reasons stated herein, the Court should grant the Petition.

Respectfully submitted,

Harry J. F. Korrell
Counsel of Record
Eric B. Martin
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

August 14, 2006

Attorneys for amici

[13] *Citing Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Abrams v. Communications Workers of America*, 59 F.3d 1373 (D.C. Cir. 1995).